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IN THE

Supreme Court of the United States

October Term, 1945.

Nos. 944, 945.

MERRITT I. EDNER, Trustee in Bankruptcy of GEORGE H. LUM, Petitioner,
v.
JENNY R. MATHEWS, Executrix of the Estate of GEORGE B. MATHEWS, Deceased, Respondent.

MERRITT I. EDNER, Trustee in Bankruptcy of GEORGE H. LUM, Petitioner,
v.
MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, a Corporation, Defendant and Third Party Plaintiff, Respondents,
v.
JENNY R. MATHEWS, Executrix of the Estate of GEORGE B. MATHEWS, Deceased, Third Party Defendant, Respondent.

Brief of Jenny R. Mathews, Executrix of the Estate of George B. Mathews, Deceased, Third Party Defendant, Respondent in Each Case.

PETITION BY PLAINTIFF FOR WRITS OF CERTIORARI TO CIRCUIT COURT OF APPEALS.

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April 8, 1946.

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I. Statement of Case.

In order to more completely and accurately summarize the pleadings and facts involved, the respondent herein outlines the following pertinent matters:

A. Action No. 1769.

Edner, as Trustee in Bankruptcy of one George H. Lum, on January 3, 1942, brought Action 1769 against George B. Mathews in the United States Court for the Western District of Pennsylvania. Mathews was a resident of New York State. Petitioner was permitted to effect service outside the Western District of Pennsylvania under

Statute 28, W. S. C. A. 118 on the plea that title to certain shares of stock in a Pennsylvania Corporation was in question.

Petitioner alleged that the contract dated February 2, 1934 transferring these shares to Mathews was contrary to the fraudulent conveyance statutes of Pennsylvania and New York. No actual fraud was alleged, the averments being that the consideration was inadequate and that the transferor was thereby rendered insolvent (Appendix 1 a to 9 a). The action was an attempt to rescind the agreement by which Lum transferred his assets, including stock, to Mathews.

B. Action No. 2200.

Subsequently on August 4, 1942, the petitioner brought a second action in the same court against the Massachusetts Mutual Life Insurance Company to secure the cash surrender value of certain life insurance policies on the life of George H. Lum (Appendix 16 a to 20 a). The policies had also been transferred to Mathews in the same contract dated February 2, 1934.

The Insurance Company deposited a bond in the sum of $42,500.00 with the District Court and interpleaded the Estate of Mathews under 28 USCA 41 (26).

The respondent interposed a counterclaim (Appendix 26 a) for absolute title to the policies as provided in the contract dated February 2, 1934 (Appendix 10 a), because George Lum in making the assignment "as collateral" had not complied with the terms of the contract.

Actions under 41 (26) are also limited in character to enable insurance companies to effect service on defendants outside the Federal District.

As in Action No. 1769 brought under 28 USCA 118, the jurisdiction of the court is and should be limited within reason to the adjudication of the single issues, title to the stock in question and the respective rights of the parties to the proceeds of the insurance.

Subsequently on February 4, 1944, the Petitioner amended the *Ad Damnum* clause in the Interpleader action, No. 2200, requesting "that all matters between this plaintiff and * * * Mathews, which grow out of or are related to, the contract or arrangement of February 2, 1934, and all other matters between the two necessary to such determination, be now fully adjudicated and determined by the Court" (Appendix 21 a).

The effect of this amendment was to bring before the court numerous extraneous issues that would not have been proper either in an action under Section 118 or under Section 41 (26) and that would have been proper only in an action brought in the United States District Court in the Western District of New York where the defendant resides (Appendix 433 a and 434 a).

C. Actions No. 1769 and No. 2200 Mutually Destructive.

Additional difficulties arose from the mutually destructive legal principles on which Actions No. 1769 and No. 2200 were predicated. In the action to obtain title to the shares of stock, petitioner contended that the contract of February 2, 1934, was void by operation of law and should be set aside (Appendix 4 a and 8 a). In the Interpleader

action, petitioner did not disaffirm the contract of February 2, 1934. On the contrary, petitioner alleged that the policies had been assigned to Mathews as collateral security under a pledge agreement to secure a loan; that the loan had been repaid, and that petitioner should be awarded the cash surrender value thereof (Appendix 16 a to 20 a). (Argument of counsel, appendix 427 a to 433 a).

D. Valid Contract of Sale.

The District Judge concluded that "The contract of February 2, 1934, was a valid contract of sale entered into for a present consideration; *i. e.*, the cancellation of Lum's debt to Mathews and the payment of debts owed by Lum at that time except a few debts that were otherwise secured" (Appendix 546 a); that it was not a general assignment for the benefit of creditors (547 a); that it was not a conveyance in defraud of creditors; that there was no evidence of actual fraud and none of statutory fraud, because the $109,765.83 which Mathews had paid to Lum was a fair consideration for the transfer of Lum's assets.

Therefore, the petitioner could not disaffirm the contract in Action No. 1769 in order to recover the shares of stock. Because it was a "valid contract of sale" the plaintiff could repurchase the assets including the insurance policies only by adhering to the terms of the contract.

E. Plaintiff's Contract Obligations Unperformed.

Lum contracted to assign three policies having a combined face value of $42,500.00 and on which $7,392.36 had already been borrowed, to Mathews and agreed to pay the future premiums thereon (Appendix 10 a). Actually, as reflected in the opinion of the District Judge, Lum did not

pay the premiums as agreed. On the contrary he obtained additional loans on the policies, thereby reducing the security, used these loans to pay premiums and made the assignments to Mathews "as collateral" instead of outright. In addition Mathews paid out $15,957.84 in premiums and to repay policy loans prior to Lum's bankruptcy in 1940 when the cash surrender value amounted to $15,-071.70, and at least $6,790.42 since that date (Appendix 545 a).

The other terms of the contract to be fulfilled by Lum to repurchase the assets thus transferred included the obligation to keep the option to repurchase alive by certain annual payments and to "repurchase any or all of the foregoing property at a price and on terms to be agreed upon at the time of repurchase by the parties thereto or their heirs, executors, or administrators" (Appendix 11 a).

There is nothing in the pleadings nor in any communications or conferences between the parties to indicate any willingness, intention or ability on the part of Lum or the petitioner to exercise the option to repurchase the property on these terms.

F. Sproul's Testimony Incompetent and Misleading.

Petitioner contends that Lum's option account was actually overpaid at the time a default was declared. Sole reliance for this claim is placed on the testimony of one Charles Sproul, an accountant retained by the petitioner. (Petitioner for writ, p. 6). Sproul made certain calculations from entries in an "Income Account" maintained by attorneys for the respondent to reflect the current status of the investment Mathews had made in Lum's assets.

From a total of all the entries for each year Sproul concluded that Lum had total credits toward his option payments of $17,245.92 when default was declared, whereas the amount required to keep the option alive, according to his figures, was $15,026.45 (Appendix 502 a).

Sproul was also requested by counsel to calculate the value of Lum's assets as of February 2, 1934, and he quoted this figure as $165,067.99, readily admitting that in making his calculation he had added together the highest possible figures that he could find in the testimony (Appendix 531 a).

The competency of this testimony was made the subject of an objection:

> "Mr. Mills: If the Court please, I object to any speculation on the part of any accountant as to values in this case. He is only encumbering the record and it is not material, and he is not competent to make any such guess calculation.
>
> Mr. Kountz: If your Honor please, all I am asking him to do is add up the figures and opinions already put in the record by other people. It is just a calculation for the assistance of the Court.
>
> Mr. Mills: You can add it up yourself. I don't think we should waste time having a witness put it in the record where it may cost money to get it out." (Appendix 503 a.)
>
> * * * * *
>
> "Mr. Mills: Is that just for your Honor's information? It isn't evidence, of course.
>
> The Court: It is just a calculation, I assume.
>
> Mr. Kountz: I will stipulate on the record here that the testimony of this witness is offered only for the assistance of the Court as a mathematical calculation. The man is not testifying as an expert except as an expert accountant." (Appendix 532 a.)

G. Accounts Used by Sproul Actually Show Deficit of $1721.66.

Relying upon the obvious incompetency of the testimony and counsel's stipulation, the respondent saw no occasion nor necessity to produce the bookkeeper and additional witnesses to adduce the actual facts.

It still appears sufficient to direct the court's attention to Plaintiff's Exhibit One entitled "Statement of Accounts of George B. Mathews against George H. Lum to January 1, 1939" (Appendix 41 a), which was completely ignored by the witness. This statement reflects that the total credits toward the option account were $13,334.98, or $1,691.43 less than the amount the witness estimated was necessary to keep the option alive.

In fact, the figures from which the witness Sproul obtained his totals include numerous items which cannot be considered in the option account, the most obvious of which is the entry dated June 1, 1937 in the sum of $2,529.71 (Appendix 109 a).

It should have been obvious to the witness that this was not a cash entry because it is prefaced by the letter "J", indicating, according to accepted accounting practice, a journal entry as distinguished from a cash receipt (R) or a cash disbursement (D).

It is not even necessary to refer to the journals for an explanation because these entries are explained in the exhibits already in evidence. On Plaintiff's Exhibit 8 (Appendix 107 a) in the asset account, appear the figures

7/5/38	(Old note cancelled)	$13,070.17
"	(New Note)	10,540.46
		$ 2,529.71

7/5/38	(Old note cancelled)	$11,805.32
	(New Note)	10,540.46
		$ 1,264.86

It is accepted practice in accounting on an accrual basis to enter these items, $2,529.71 and $1,264.86, in the income account merely as a recognition of a debt.

A further explanation of the bookkeeping practice involved appears in the direct examination of Joseph A. Albrecht by counsel for the petitioner (Appendix 67 a). This was not an account between Lum and Mathews (Appendix 76 a) and this procedure was used merely to assist in computing the 4% interest which was to attach to the repurchase price if and when Lum exercised his option to repurchase the assets in accordance with Article VII of the contract (Appendix 12 a).

The same is true of an entry on June 1, 1934 in Plaintiff's Exhibit 8-B in the sum of $1,264.86 prefaced by the explanation "J 272" (Appendix 111 a).

No such sums were received from Lum, either in cash or on his behalf from the investment.

These are not the only items erroneously included in the totals in Sproul's testimony. The income account reflects cash receipts amounting to $146.56, representing interest on a note executed by Lum on July 20, 1934, subsequent to the contract of sale and independent of that transaction.

Therefore without further inquiry it is apparent that the total of $17,245.92 computed by witness Sproul must

be reduced by $3,941.13. The $2,219.47 overpayment "calculated" by Sproul has been replaced with a deficit of at least $1,721.66.

Since the true facts are apparent from the exhibits themselves it is difficult to understand how a qualified accountant could pretend otherwise. Furthermore, petitioner's repeated references to the "uncontradicted evidence" with reference to Sproul's testimony is somewhat inconsistent with Counsel's stipulation that his testimony was incompetent, the deficiency in option payments shown in Plaintiff's Exhibit # 1 and the witnesses admitted use of the "highest possible" figures in the evidence in making calculations.

H. Decision of District Court Upheld Three Times by Circuit Court.

Petitioner appealed to the Circuit Court of Appeals for the Third Circuit and the judgment was affirmed on October 16, 1945 (Appendix 585 a).

A petition for a rehearing reciting, among other things, the allegation that Lum was not in default on his option payments, was denied on December 13, 1945 (Appendix 589 a).

On March 4, 1946 the Circuit Court again reviewed this specific question on motion of the petitioner for a recall of mandate and an extention of time in which to file a petition for rehearing (Appendix 592 a). This motion was also denied.

ARGUMENT.

POINT I.

Petition does not recite proper or sufficient grounds for invoking the jurisdiction of this Court under its Rule 38, Subdivision 5 (b).

This court has repeatedly held that a writ of certiorari will not issue "merely to review the evidence or the inferences drawn from it."

General Talking Pictures Corporation v. Western Electric Company, 304 U. S. 175, rehearing denied 305 U. S. 675.

And where "these findings were made, after hearing, by the District Judge, upon undisputed or conflicting evidence," and "were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable."

Alabama Power Company v. Harold L. Ickes, 302 U. S. 464.

Particularly is this true where both the District and Circuit Courts have concurred in findings of fact which are not shown to be plainly erroneous or unsupported by the evidence.

Virginia Street Railway Co. vs. System Federation No. 40, 300 U. S. 515.

A. M. Anderson vs. Katherine Kilpatrick Abbott, 321 U. S. 349, rehearing denied 321 U. S. 804.

Goodyear Tire and Rubber Company, Inc. v. Ray-O-Vac Company, 321 U. S. 275.

These citations are certainly applicable to this petition. The question as to whether or not the option payments were made in accordance with the terms of the contract is a question of fact, necessitating a review of the testimony and exhibits, including an appraisal of the credibility of witnesses, the sufficiency of proof and similar questions.

The construction of the contract presents a question of law insofar as the rights of the parties are to be determined in accordance with the law of the State of New York where the agreement was executed. Otherwise it is primarily a question of fact involving its self-sufficiency, the nature of the terms thereof and the definitive rights and obligations of the parties thereto.

No conflict on the law is alleged and the findings of fact and the Court's conclusion of law that it was a valid contract of sale were affirmed by the Circuit Court of Appeals for the Third Circuit and reaffirmed on two subsequent petitions for a rehearing.

POINT II.

Petitioner's request for an accounting transcend the jurisdiction of the District Court arising out of Section 118 or interpleader action.

This litigation originated in Action No. 1769 to determine title to certain shares of stock in a Pennsylvania Corporation under Section 118, Title 28, U. S. C. A. This action was predicated on the theory that the transfer was void because in fraud of creditors. When the contract was upheld as a valid contract of sale for a fair and present consideration of $109,765.83, petitioner abandoned this

theory and now affirms the contract, contending that it constituted a mere pledge.

Since the petitioner now affirms the contract, the title to the shares is no longer in question and the jurisdiction over the respondent with respect to that action has ceased.

The District Court also acquired jurisdiction of the respondent, a non-resident, for the limited purpose described in Section 41 (26) of Title 28, U. S. C. A. This was an interpleader Action, No. 2200, limited to a determination of the rights of the parties to certain insurance policies.

By amendment to the *ad damnum* clause in the interpleader action, the petitioner endeavored to enlarge the issues beyond the scope of the statute cited, by requesting the court to adjudicate all matters between parties arising out of the contract of February 2, 1934 (Appendix 433 a).

It is true that respondent might have withdrawn his appearance when, by the amendment, the petitioner was allowed to present an entirely new or radically different cause of action, on the grounds that enforced appearance for one purpose should not be used for a broader or different purpose.

Maya Corporation v. Smith, 32 Fed. (2nd) 350.

However, such a withdrawal would have jeopardized the respondent's rights to the insurance policies, the court having jurisdiction to make a judgment in *rem*.

Therefore respondent continued to appear in the interpleader action under protest to the added cause of action for an accounting and still maintains that the relief demanded by the petitioner transcends and is completely outside the jurisdiction of the District Court.

POINT III.

Question of payment or non payment of option installments immaterial to decisions in Actions No. 1769 and No. 2200.

In view of the foregoing analysis of the jurisdiction which the District Court acquired over the respondent in the two actions initiated by the petitioner, it is apparent that the question of whether or not Lum kept his option alive is immaterial.

It is submitted that the petitioner's rights to the policies were determined by the contract of February 2, 1934 and not by his payment or non-payment of the option installments.

His remedy, even if compliance could be established, would lie in an action for damages on the contract or for an accounting. Such actions would have to be brought in the District Court for the Western District of New York where respondent resides.

Petitioner, in effect, affirms the contract which transferred title to the policies and demands an accounting to determine whether or not Matthews has realized more on the transferred assets than $109,765.83 plus interest at 4%. Presumably the petitioner is demanding that, if any excess be found, such excess should be paid over to him. He would like to have the insurance policies considered part of the excess.

On the other hand, petitioner might be seeking damages for an alleged breach of the contract giving Lum an option to repurchase the transferred assets. Presumably

some method would have to be devised to determine the amount of damages and Petitioner evidently would like to have the insurance policies included in the measure of damages.

It is difficult to see how the District Court for the Western District of Pennsylvania could make any such award when its jurisdiction is founded solely on actions of a limited character.

Moreover, even if the option were considered still alive it would be incumbent upon petitioner to tender the purchase price as a prerequisite to compelling performance.

In the case of the insurance policies the respondent has already made payments for premiums and to discharge Lum's policy loans in an amount several thousands of dollars in excess of the cash surrender values. So there could be no equity in favor of the petitioner even if he succeeded in this action.

POINT IV.

Petitioner, if aggrieved by the 12th Finding of Fact, had adequate remedy to correct it by motion to District Court.

If, as contended by the petitioner, the 12th finding is in need of clarification, he had an adequate and immediate remedy too for that purpose in a motion to the District Court under Rule 52 (b) of the Rules of Civil Procedure:

> "(b) Amendment. Upon motion of a party made not later than ten days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly * * *."

No such motion was made by the petitioner.

The question was later raised by appeal to the Circuit Court of Appeals. The judgment in favor of the respondent was affirmed. The petitioner then filed a petition for a rehearing specifying the 12th finding as error. This was denied. A further motion was made to recall the mandate, referring in even greater detail to the 12th finding.

The Circuit Court of Appeals, in its opinion, said: "We quite realize that the questions are arguable".

Nevertheless, the Court continued "The District Judge, having all the testimony before him, resolved it in well defined conclusions. We think that all his conclusions are supported by such evidence and we could not say, if we would, that they are clearly erroneous".

POINT V.

The construction of the contract of February 2, 1934, approved on three separate occasions by the Circuit Court of Appeals.

Petitioner has apparently abandoned his original theory that the contract of February 2, 1934 was void because a conveyance in fraud of creditors and now affirms the contract and contends that it constituted a pledge.

In making this assertion, petitioner refers to those provisions in the contract which were intended to enable Lum to repurchase any or all of his assets.

This was strictly a business transaction to extricate Lum from serious financial difficulties. Nevertheless, Mr. Mat-

hews agreed to tie up $109,765.83 of his money for a period up to 15 years with the possibility of realizing only 4% on his investment so that his friend might be able to repurchase his assets. This was not a loan. Lum had already borrowed to the extent of his worldly goods and the only alternatives were the threat of future bankruptcy or a sale of his assets for enough money to insure his solvency.

The contract is explicit that it was a sale and with the exception of the collateral assignment of the insurance policies made by Lum himself in violation of his contract, all the evidence shows that all the incidents of ownership were vested in Mathews.

It is universally held that when the intent of the parties is expressed in clear and unambiguous language, the courts will enforce the contract according to its terms. No ambiguity or lack of clarity is alleged. No attempt was made by the petitioner to fully explore the intent of the parties. In fact the only witnesses interrogated on the subject were Edward N. Mills and Joseph A. Albrecht, both of whom were called by the petitioner and whose testimony is binding upon him.

> "Question: Mr. Albrecht, could you explain this: Is it your theory that this contract, or is it your position that this contract of February 2, 1934, whereby the assets were transferred from Lum to Matthews was an arrangement of pledge, or was it an outright conveyance?
>
> Answer: Outright conveyance." (Appendix 56 a.)
>
> * * * * *
>
> "Question: Mr. Mills, is it your position that this transaction represented by this contract of February 2, 1934 between these parties, was an outright transfer by Lum, or a pledge?
>
> Answer: Well, the contract speaks for itself; but my interpretation is that it was an outright sale of all his right, title and interest.

Question: Was there any intention of the parties, so far as developed by you in your conferences and intercourse with the parties in and about the time that the contract was made, that the parties actually intended the pledge?

Answer: No, nothing whatever.'' (Appendix 38 a.)

It is true that the construction of contracts ordinarily presents mixed questions of fact and law. Nevertheless, the District Judge made at least seven separate findings with reference to the contract and his opinion cites the applicable case and statutory law of the State of New York in support of his conclusion of law that the contract "was a valid contract of sale".

There is no conflict to be resolved by the Supreme Court. The conclusion of the District Judge is consistent with the judicial decisions in similar cases in the State of New York.

Tompkins vs. Hunter, 149 N. Y. 117.
Kelly vs. Babcock, 49 N. Y. 318.
Hine vs. Bowe, 114 N. Y. 350.
Dodge vs. McKechnie, 156 N. Y. 514.
Cook vs. Berrott, 21 N. Y. Supp. 358.

The conclusion of the District Judge with reference to the contract was affirmed by the Circuit Court of Appeals, and no conflict is alleged with a similar decision in any other circuit.

The case of Home Bond Company vs. McChesney, 239 U. S. 568, is not comparable. That case involved an alleged purchase of accounts receivable at certain discounts. The debtor remained the ostensible owner of the accounts receivable, made the collections at his own expense, assumed the risk of any uncollectable accounts, and remitted the

amounts collected to the so-called purchaser to repay the amounts of so-called "purchase price" advanced. It was held that the transaction was a transfer of the accounts receivable merely as collateral security for loans at usurious rates of interest and that the words of purchase were sham and devices to conceal this purpose.

Obviously this decision has no application to a situation where all the incidents of ownership were transferred for a fair and present consideration.

In General Motors Acceptance Corporation vs. Mid-West Chevrolet Co., 66 Fed. (2nd) 1, an automobile dealer who had been transferring conditional sales contracts to GMAC brought an action to recover twice the interest paid on a series of allegedly usurious loans. The evidence of the nature of agreement rested in oral conversations, correspondence and certain printed forms known as the GMAC Plan. The Circuit Court held that the evidence did not justify a conclusion that the transactions were loans at usurious rates of interest and reversed the verdict which had been awarded the dealer.

In Mount Tivy Winery Co. vs. Lewis, 134 Fed. (2nd) 120, the plaintiff winery was taxed on wine it had stored with the Fidelity Warehouse Corporation. The winery contended that the tax should be paid by the bank because the bank held negotiable warehouse receipts under an agreement transferring these and similar documents to the bank as "collateral security" for the winery's indebtedness. The winery was held liable for the floor stock tax.

None of these cases bear on the issues or contain a comparable set of facts.

Conclusion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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